

The Hart-Scott-Rodino Act: Needing a Second Opinion About Second Requests

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In 1976, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act (HSR) to enable the Department of Justice (DOJ) and Federal Trade Commission (FTC) to challenge a merger or acquisition before the transacting companies become inextricably intertwined. By requiring the companies to give the federal antitrust agencies advance notice of the proposed transaction, HSR enables the DOJ and FTC to gather information, analyze potential antitrust issues, and challenge the deal before it is consummated.

This Note explores the history and practical consequences of HSR. Specifically, it analyzes the "Second Request" process for obtaining additional information and concludes that the federal antitrust agencies have used the Second Request process as a de facto injunction. This Note examines the costs and benefits of using the Second Request in this manner, addresses potential limitations upon agency power, and concludes that Congress should provide a process of expedited review by a neutral panel of experts to better approximate congressional intent behind HSR's enactment.

I. INTRODUCTION

"The sole consistency that I can find is that in [antitrust merger litigation], the Government always wins."¹ Justice Potter Stewart's remark

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¹ *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) (referencing the government's merger litigation record before the United States Supreme Court). As noted by Justice Stewart, the government generally "won" on the issue of liability in antitrust merger litigation before the United States Supreme Court; however, the government actually failed to achieve an effective remedy for the antitrust violation in most cases because of the complexity and integration of the merging parties. Andrew G. Howell, Note, *Why Premerger Review Needed Reform—And Still Does*, 43 WM. & MARY L. REV. 1703, 1714 (2002) (noting the government's perfect record in merger litigation before the Warren Court); see also Kenneth G. Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & ECON. 43, 48–51 (1969) (noting the government's attainment of sufficient relief in only ten of thirty-nine cases, or approximately twenty-

primarily attacked the federal government's litigation success before the United States Supreme Court under § 7 of the Clayton Act.² Congress, however, unintentionally extended the federal government's merger regulation success beyond the courtroom when it enacted the Hart-Scott-Rodino Antitrust Improvements Act (HSR)³ in 1976 by providing an investigatory mechanism capable of delaying a merger or acquisition indefinitely.⁴

HSR provides a procedural mechanism for the two primary federal antitrust enforcement agencies—the Federal Trade Commission (FTC) and the Department of Justice (DOJ)—to conduct merger investigations.⁵ It addresses the concern that companies become, “in effect, irreversibly ‘scrambled’ together” once a merger is completed.⁶ HSR deals with this concern by requiring each of the merging parties to submit premerger notification of transactions to the FTC and DOJ.⁷ Because the FTC and DOJ need sufficient time and information to accurately assess potential anticompetitive effects of the transaction and determine whether to seek a preliminary injunction, HSR also provides a thirty-day automatic stay to prohibit consummation of the transaction⁸ and permits the agencies to submit a “Request for Additional Information and Documentary Material” (popularly known as a “Second Request”) to obtain additional information from the merging companies.⁹

Despite HSR's enactment as merely a procedural mechanism, the FTC and DOJ quickly shifted merger regulation from a system of review by a neutral arbiter (the judiciary) to review by the agencies. The agencies accomplished this power shift by using the HSR Second Request process as a *de facto* injunction.¹⁰ Although powerful antitrust agencies may be desirable,

five percent, during the 1950s). Even when the government was awarded sufficient relief by the Court, it often took years to implement successfully, that is, unscrambling the egg. H.R. REP. NO. 94-1373, at 8–9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2641.

² Howell, *supra* note 1, at 1714.

³ Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified as amended at 15 U.S.C. § 18a (2000)).

⁴ Unless otherwise noted, “merger” shall not be limited to statutory mergers in this Note. Rather, it shall be used to encompass a broad range of transactions, including statutory mergers, stock acquisitions, asset acquisitions, and any other transaction subject to HSR.

⁵ See 15 U.S.C. § 18a (2000).

⁶ H.R. REP. NO. 94-1373, at 8.

⁷ 15 U.S.C. § 18a(a), (d) (2000).

⁸ *Id.* § 18a(b). For cash tender offers, the automatic stay is fifteen days. *Id.*

⁹ *Id.* § 18a(e); see also *infra* notes 65–71 and accompanying text.

¹⁰ Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to*

and the premerger notification and automatic stay provisions of HSR may be necessary for effective enforcement of the federal antitrust laws, the nearly-unlimited power currently exercised by the agencies¹¹ harms both companies and consumers. By effectively evading judicial review and unilaterally imposing substantive judgment on proposed mergers,¹² the agencies impose direct expenses, timing delays, and continuous disclosure obligations upon the transacting parties.¹³ Moreover, the agencies may be harming consumers¹⁴ because the possibility of receiving a burdensome Second

Antitrust Legislation, 65 ANTITRUST L.J. 865, 881 (1997) (noting that the FTC and DOJ have “essentially create[d] the automatic stay of a transaction that the 94th Congress explicitly refused to grant . . .”); see also Edward T. Swaine, “*Competition, Not Competitors*,” *Nor Canards: Ways of Criticizing the Commission*, 23 U. PA. J. INT’L ECON. L. 597, 632 (2002) (asserting that “American companies might be slow to characterize the HSR process as one susceptible to judicial oversight” because “[v]oluminous Second Requests” act as “de facto injunctions”).

¹¹ There may be budgetary and political constraints upon the agencies’ general activities; however, they do not serve as effective constraints upon the issuance of an unreasonably burdensome Second Request. While logic dictates that requesting unnecessary information from merging companies would impose substantial staffing and storage costs upon the agencies, this is generally untrue because neither the statutes, nor the regulations promulgated by the agencies, requires staff to review documentation provided in response to a Second Request. In fact, unopened boxes of information have allegedly been returned to parties because the agencies simply did not review the information. See Shirley Johnson, *HSR Changes Sharpen Focus on Bigger Deals*, MERGERS & ACQUISITIONS J., Apr. 1, 2001, at 30. Moreover, the courts have rejected the notion that agencies are required to review all HSR filings submitted to them. See, e.g., *SBC Commc’ns, Inc. v. FCC*, 56 F.3d 1484, 1496 (D.C. Cir. 1995) (holding that the FCC, which has concurrent jurisdiction over communications antitrust issues, is not required to review all HSR filings because “[t]he HSR documents contained millions of pages; for the Commission to have sorted through all of them would have delayed a decision on the transfer indefinitely”). Then-Judge Ruth Bader Ginsburg, writing the majority opinion, characterized the HSR filing requirements as “extensive” and “voluminous.” *Id.* at 1489, 1496.

¹² The issuance of a Second Request has been described as

put[ting] you in preventative detention while [the agencies] beat you with a rubber hose . . . to try to get you to cop a plea bargain If you will not agree to the plea bargain, then you stay in preventative detention for several more months while the agency tries to persuade a federal judge that you were likely to rob the bank, whether you knew it or not.

Joe Sims & Michael McFalls, *Negotiated Merger Remedies: How Well Do They Solve Competition Problems?*, 69 GEO. WASH. L. REV. 932, 935 (2001).

¹³ See *infra* Part IV.

¹⁴ See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (noting that the purpose of the antitrust laws is to protect competition, not competitors, and, accordingly, rejecting a claim that defendants’ predatory pricing scheme violated the

Request likely prevents or deters companies from proposing procompetitive mergers, thereby eschewing the generally accepted purpose of the federal antitrust laws—to encourage competition.¹⁵ As a result, consumers may be denied the benefits of market efficiencies through lower prices of goods and services.¹⁶

After the agencies began to use the Second Request as a de facto injunction, parties attempted to circumvent the injunction by forcing the FTC or DOJ to file a complaint for a preliminary injunction.¹⁷ Parties may force agency action by: (1) providing certain documentation in response to a Second Request investigation; (2) certifying compliance with the Second Request; and (3) announcing their intention to consummate the transaction in the near future.¹⁸ While the procedure risks substantial civil penalties for noncompliance,¹⁹ causes litigation expenses, and was previously rejected in court,²⁰ it may be the best alternative for companies that seek faster

antitrust laws). For a discussion on the increased emphasis that the European Union places on particular competitors, see Swaine, *supra* note 10, at 597–98.

¹⁵ While there have been disagreements about the specific purpose of the antitrust laws since the enactment of the Sherman Act in 1890, most theorists accept that the general purpose of the antitrust laws is to protect competition. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 19–21 (rev. ed. 1993) (claiming that the general purpose of the Sherman Act was to protect competition by considering only economic theory); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1075 (1979) (recognizing that the general purpose of protecting competition is achieved primarily by economic considerations, but claiming that noneconomic considerations should also factor into the decision-making process); see also Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 67 (1982) (stating that “it is unanimously agreed that Congress enacted these [federal antitrust] laws to encourage competition” despite disagreement “over Congress’ ultimate goals . . .” and presenting an alternative view to those presented by Pitofsky and Bork). The Supreme Court also has endorsed this proposition. See *Brooke Group Ltd.*, 509 U.S. at 224 (citing *Brown Shoe Co.*, 370 U.S. at 320) (declaring that the purpose of the federal antitrust laws is to protect competition, not competitors).

¹⁶ See *Brooke Group Ltd.*, 509 U.S. at 224 (considering the effect of an alleged predatory pricing scheme on consumers).

¹⁷ See, e.g., Complaint for Injunctive Relief Pursuant to Section 7A(g)(2) of the Clayton Act and Section 13(b) of the Federal Trade Commission Act, *FTC v. Blockbuster, Inc.*, No. 1:05-cv-00463 (D.D.C. Mar. 4, 2005).

¹⁸ See *id.*

¹⁹ 15 U.S.C. § 18a(g) (2000). Noncompliance with the HSR provisions may result in an \$10,000 fine for each day in which the person or entity violates the statute and regulations. *Id.* § 18a(g)(1).

²⁰ See *FTC v. McCormick & Co.*, 1988-1 Trade Cas. (CCH) para. 67,976 (D.D.C. 1988) (ordering McCormick to comply with a Second Request issued by the FTC and prohibiting consummation of the transaction).

resolution of the merger review process and question the theoretical and factual underpinnings of the agencies' antitrust concerns.

This Note examines the Second Request process and concludes that federal antitrust agencies currently exercise more power than Congress anticipated when HSR was enacted. Recent moves by the Oracle Corporation (Oracle) and Blockbuster, Inc. (Blockbuster)²¹ are evidence that some companies believe that the FTC and DOJ are overreaching their bounds and that certain merger proposals are important enough to their constituents for them to incur significant litigation costs and exposure to hefty monetary penalties. Because there are tremendous risks associated with forcing the agencies to file a complaint, however, Congress should expressly provide a method for companies to affirmatively challenge the scope of a Second Request and whether the company achieved "substantial compliance" before a neutral arbiter. Giving the companies an opportunity to actively challenge the agencies' Second Requests should help implement the more balanced investigatory approach originally anticipated by Congress when it enacted HSR.

Part II of this Note provides an overview of the federal antitrust laws, specifically focusing on the HSR provisions and statements made by congressmen during the legislative process. Part II also details the Second Request process, the agencies' use of Second Requests, and HSR's practical ramifications for the business world. Benefits of the agencies' current HSR practice are presented in Part III, while Part IV provides an analysis of the corresponding costs. Significant attention is given to the unduly burdensome expenses, timing delays, and disclosure obligations imposed upon companies, as well as potential costs to consumers. Part V examines the method by which parties may attempt to circumvent a *de facto* injunction. Parts VI and VII examine three possible solutions to the usurpation of antitrust regulation from the courts, stressing Congress's intent to balance the interests of the antitrust agencies and potential merger partners. On the one hand, the agencies require time and information to conduct a thorough, complex, and accurate investigation.²² On the other hand, the agencies should be prevented from imposing unduly burdensome costs on businesses, thereby encouraging procompetitive mergers and, consequently, benefiting consumers. Finally, Part VIII concludes that a process of expedited review by

²¹ See *infra* notes 162–78 and accompanying text.

²² Antitrust enforcement under the Clayton Act is inherently speculative to some extent because of its language. William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 GEO. MASON L. REV. 843, 846 n.9 (2001) (referring to Section 7 of the Clayton Act, which prohibits certain transactions whose effect "may be substantially to lessen competition, or to tend to create a monopoly") (emphasis added).

a panel of experts, with a clear and convincing burden of proof placed on the defendants to show that a Second Request is unduly burdensome, better approximates the congressional intent behind HSR's enactment.

II. THE PATH FROM JUDICIAL REVIEW TO ADMINISTRATIVE REGULATION

A. *Federal Antitrust Laws*

On July 2, 1890, President Benjamin Harrison signed the first major piece of federal antitrust legislation into law—the Sherman Act.²³ The Sherman Act established an enforcement mechanism that included judicial review of any “contract, combination . . . , [and] conspiracy, in restraint of trade,” and imposed both criminal and civil penalties for unlawful restraints.²⁴ Between 1890 and 1914, the government successfully litigated several important cases under the general language of the Sherman Act;²⁵

²³ Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § § 1–7 (2000)). Prior to this date, two state-level restrictions indirectly limited business associations. See D.T. ARMENTANO, *THE MYTHS OF ANTITRUST: ECONOMIC THEORY AND LEGAL CASES* 75 (1972). First, states often imposed taxes on individuals that owned stock in out-of-state corporations. *Id.* Second, states often prohibited corporations from owning stock in other corporations. *Id.* Creative business executives, however, eventually developed “trusts” that effectively evaded these state restrictions. See *id.* Once these trusts became prevalent, “widespread discontent with business” necessitated congressional attention. THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 1 (John E. Kwoka, Jr. & Lawrence J. White eds., 4th ed. 2004) [hereinafter ANTITRUST REVOLUTION]; see also Howell, *supra* note 1, at 1708–09. The trusts were also relatively large. For example, at least one trust was valued at nearly one billion dollars by 1901, THOMAS J. MISA, *A NATION OF STEEL: THE MAKING OF MODERN AMERICA 1865–1925*, at 166 (1995) (referencing the organization of U.S. Steel)—nearly the budget of the entire federal government only a few years earlier. T.B. Reed, *Spending Public Money*, 154 N. AMER. REV. 319, 319 (1892). Congress quickly responded by enacting the Sherman Act.

²⁴ 15 U.S.C. § § 1–7 (2000).

²⁵ See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 59–62 (1911) (holding that only unreasonable restraints of trade were proscribed by the Sherman Act, but ultimately finding that the defendants engaged in illegal restraints of trade in the petroleum industry). This historic antitrust case established the “Rule of Reason,” *id.* at 62–63, as the legal standard for determining whether there has been a violation of the Sherman Act, which, some have argued, made inconsistent enforcement of the Sherman Act inevitable. See Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 341–46 (2000). The Rule of Reason generally condemns unreasonable restraints of trade. See *Standard Oil*, 221 U.S. at 62–63.

however, it was unsuccessful nearly 40% of the time, partially because of the Supreme Court's holding in *Standard Oil Co. v. United States* that only "unreasonable" restraints of trade were proscribed by § 1 of the Sherman Act.²⁶

After public discontent with businesses facilitated President Woodrow Wilson's election (antitrust platform),²⁷ Congress enacted the Federal Trade Commission Act²⁸ and the Clayton Act²⁹ to strengthen antitrust enforcement, especially in the context of mergers and acquisitions. The FTC Act established the Federal Trade Commission as an independent federal agency to review trade practices and conferred the authority to issue cease-and-desist orders when the agency determined that a company was engaged in unfair trade practices.³⁰ The primary effect of the Clayton Act, on the other hand, was to update the Sherman Act's prohibition on illegal restraints of trade with respect to certain practices—for example, mergers, local price discrimination, exclusive dealing contracts, tying contracts, and interlocking directorates—because of the uncertainty associated with the standards of review utilized by the courts.³¹ In essence, it more specifically defined the "Rule of Reason" established by the Supreme Court as the standard of review for these arrangements in *Standard Oil*.³² Section 7, for example, prohibits mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly."³³

Until 1976, courts were the final arbiters of alleged antitrust merger violations. During this period, litigation generally arose in two broad contexts: (1) "horizontal" transactions between actual or potential rivals,³⁴ and (2) "vertical" transactions between suppliers and customers.³⁵ While the

²⁶ See HOUSE SELECT COMM. ON SMALL BUSINESS, CONGRESS AND THE MONOPOLY PROBLEM: FIFTY-SIX YEARS OF ANTITRUST DEVELOPMENT, 1900–1956, H.R. DOC NO. 85-240, at 659 (1957).

²⁷ Howell, *supra* note 1, at 1712.

²⁸ 15 U.S.C. § 41–51 (2000).

²⁹ *Id.* §§ 12–27, 44; 28 U.S.C. § 52 (2000).

³⁰ 15 U.S.C. § 41–51 (2000).

³¹ *Id.* §§ 12–27, 44; 28 U.S.C. § 52 (2000).

³² ROGER SHERMAN, ANTITRUST POLICIES AND ISSUES 39 (1978) ("The Clayton Act could be seen as an effort to define unreasonable behavior more specifically to make it easier to prove, thereby harnessing the rule of reason to good effect.").

³³ 15 U.S.C. § 18 (2000).

³⁴ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 334 (1962) (describing horizontal transactions as "[a]n economic arrangement between companies performing similar functions in the production or sale of comparable goods or services").

³⁵ See *id.* at 323–24 (describing vertical transactions as "[e]conomic arrangements between companies standing in a supplier-customer relationship").

administrative agencies made the initial determination as to whether a transaction or trade practice should be challenged, courts provided the ultimate substantive review and declined to enjoin a transaction unless the agency responsible for its review established that the probable effect of the activity or transaction was to substantially lessen competition or create a monopoly, often by demonstrating that it would result in higher prices or reduced innovation.³⁶ If the agency failed to meet its burden, the activity or transaction could proceed.³⁷ This process of judicial review, however, changed dramatically with the passage of HSR, when the FTC and DOJ began using the HSR premerger notification process to effectively “eviscerate[] judicial review of merger policy.”³⁸

B. *Hart-Scott-Rodino and Second Request Investigations*

1. *Statutory and Regulatory Authority*

The provisions of HSR provide a relatively straightforward mandate that certain transactions be reported to the federal antitrust agencies prior to consummation of a deal.³⁹ The provisions, as enacted, balance the needs of the federal antitrust agencies and the transacting parties by, among other things, requiring premerger notification of certain transactions and their major elements, and expressly requiring only “substantial compliance” with agency requests and limiting time periods for review.⁴⁰

Subject to limited exceptions, when a transaction exceeds certain value thresholds, parties are required to notify the Antitrust Division of the DOJ

³⁶ See *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 501–02 (1974) (rejecting the government’s claim that evidence of past coal production was highly relevant in determining possible future anticompetitive effects of a proposed merger because of the prevalence of long-term supply contracts); see also *Sims & McFalls*, *supra* note 12, at 932 n.1 (noting that “[t]o obtain injunctive relief, antitrust enforcement agencies must show . . . anticompetitive effects in the marketplace through higher prices or reduced innovation”).

³⁷ See *Gen. Dynamics*, 415 U.S. at 501–02.

³⁸ Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1298 (1999) (citing *Sims & Herman*, *supra* note 10, at 897–98 & n.96) (describing the unintended effects of HSR legislation, the coercive nature of the agencies’ use of Second Requests, and the problems associated with ex ante regulation of merger proposals). But see William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 849–52 (1997) (claiming that the FTC and DOJ have not utilized the HSR provisions in a coercive manner that usurps substantive merger review from the courts).

³⁹ See 15 U.S.C. § 18a (2000).

⁴⁰ *Id.*

and the Bureau of Competition of the FTC of the proposed merger or acquisition.⁴¹ As amended by the HSR Reform Act of 2000,⁴² HSR generally requires premerger filing when: (1) at least one party to the transaction is engaged in commerce or an activity affecting commerce, and (2) when the size of the transaction exceeds \$200 million (commonly known as the “size-of-transaction test”).⁴³ When the size of the transaction does not exceed \$200 million, but is in excess of \$50 million, premerger filing is generally required if one party has at least \$10 million in sales or assets, and the other party has at least \$100 million in sales or assets⁴⁴—commonly referred to as the “size-of-person test.”⁴⁵

HSR provides exemptions from the filing requirement⁴⁶ and the antitrust agencies have exempted several other transactions in the regulations.⁴⁷ These exemptions include: transactions in the ordinary course of business;⁴⁸ acquisitions of certain nonvoting securities;⁴⁹ certain acquisitions of voting securities by a majority shareholder;⁵⁰ relatively small acquisitions (less than 10% of the outstanding voting securities) for investment purposes only;⁵¹ acquisitions of voting securities that do not increase, directly or indirectly, the acquiring person’s proportionate share of the outstanding voting securities;⁵² and certain investments by banks, banking associations, trust companies, investment companies, and insurance companies.⁵³

When a company qualifies for mandatory reporting under the HSR Act, however, it must submit a Notification and Report Form⁵⁴ to both antitrust

⁴¹ *Id.* § 18a(a) (2000); 16 C.F.R. § § 801–803 (2005).

⁴² H.R. 5548, 106th Cong. § 630 (2000) (enacted into law by Pub. L. 106-553, § 1(a)(2), 114 Stat. 2762 (2000)).

⁴³ 15 U.S.C. § 18a(a) (2000); Howell, *supra* note 1, at 1715 n.87. Several exemptions from the premerger notice requirement exist in the regulations promulgated by the agencies. *See* 16 C.F.R. § 802 (2005).

⁴⁴ 15 U.S.C. § 18a(a) (2000).

⁴⁵ *See* Howell, *supra* note 1, at 1723.

⁴⁶ *See* 15 U.S.C. § 18a(c) (2000).

⁴⁷ *See* 16 C.F.R. § 802 (2005).

⁴⁸ 15 U.S.C. § 18a(c)(1) (2000); 16 C.F.R. § 802.1 (2005).

⁴⁹ 15 U.S.C. § 18a(c)(2) (2000).

⁵⁰ 15 U.S.C. § 18a(c)(3) (2000); 16 C.F.R. § 802.30 (2005).

⁵¹ 15 U.S.C. § 18a(c)(9) (2000); 16 C.F.R. § 802.9 (2005).

⁵² 15 U.S.C. § 18a(c)(10) (2000); 16 C.F.R. § 802.10 (2005).

⁵³ 15 U.S.C. § 18a(c)(11) (2000); 16 C.F.R. § 802.53–64 (2005).

⁵⁴ 16 C.F.R. § 803 app. (2005). The standardized form is also available at the FTC’s website (<http://www.ftc.gov>).

agencies, and the acquiring party must pay a filing fee.⁵⁵ If the transaction is not a negotiated deal (e.g., a hostile tender offer), the acquiring party must notify the target prior to filing the premerger notice with the FTC. After notification, the target must file documents within ten to fifteen days, depending on the transaction.⁵⁶

The initial Notification and Report Form is a fifteen-page document that may require additional attachments depending on the complexity of the parties and of the transaction.⁵⁷ The form contains basic information about the parties and structure of the merger proposal.⁵⁸ It also requires Securities and Exchange Commission (SEC) filings, financial statements, sales revenue information for each industry and product, information about prior relationships between the parties, and other information about the relevant geographical market.⁵⁹ One of the most contentious filing requirements is the submission of Item 4(c) documents, otherwise known as studies, surveys, analyses, and reports prepared by or for any officer or director in relation to the transaction.⁶⁰

Once the premerger notice has been filed with both agencies, a thirty-day statutory waiting period (fifteen days for cash tender offers or the purchase of assets in a bankruptcy proceeding) prohibits consummation of the transaction.⁶¹ During the waiting period, the FTC and DOJ staffs review the information provided in the Notification and Report Form to determine if further investigation is needed to assess whether there may be a violation of the federal antitrust laws.⁶² Many transactions reported under HSR do not

⁵⁵ 16 C.F.R. § 803.9 (2005). Depending on the size of the transaction, the original filing fee ranged from \$45,000 to \$280,000. *Id.*

⁵⁶ 16 C.F.R. § 801.30(b) (2005).

⁵⁷ *See id.* § 803 app. The government estimates that compliance time for the initial Notification and Report Form varies from 8 to 160 hours, with an average response time of 39 hours. *Id.* The estimate, however, only includes the initial filing; second request compliance time is not included.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* For an example of the significant penalties associated with the failure to file Item 4(c) documents, see *United States v. Automatic Data Processing, Inc.*, 1996-1 Trade Cas. (CCH) para. 71,361 (D.D.C. 1996) (imposing a civil penalty of \$2.97 million for failing to file all the relevant Item 4(c) documents). *See also* *United States v. Blackstone Capital Partners II Merchant Banking Fund L.P.*, 1999-1 Trade Cas. (CCH) para. 72,484 (D.D.C. 1999) (entering consent judgment against an individual as well as against the entity for failing to file Item 4(c) documents).

⁶¹ 15 U.S.C. § 18a(b) (2000); 11 U.S.C. § 363(b)(2) (2000); 16 C.F.R. § 803.10 (2005).

⁶² AMERICAN BAR ASSOCIATION, *THE MERGER REVIEW PROCESS: A STEP-BY-STEP GUIDE TO FEDERAL MERGER REVIEW* 117 (Ilene K. Gotts ed., 2d ed. 2001). Each of the

require additional investigation, and, therefore, the agencies will often grant early termination of the statutory waiting period.⁶³ When either the FTC or DOJ determines that there are potential anticompetitive effects of the merger or acquisition, however, there is a “clearance” procedure for determining which agency will be responsible for further investigation and the additional investigation will then proceed.⁶⁴

Additional investigation is achieved through the issuance of a “Request for Additional Information and Documentary Material,” commonly known as a Second Request.⁶⁵ A Second Request achieves two agency goals: (1) obtaining information about potential anticompetitive effects, and (2) maintaining the status quo until the decision of whether to seek injunctive relief is made.⁶⁶ Once an agency issues a Second Request, a statutory thirty-day automatic stay applies and does not begin to toll until parties have substantially complied with the Second Request.⁶⁷ *Substantial* compliance implies less than full compliance. According to the agencies, however, “substantial compliance” is nothing less than full compliance.⁶⁸

In 1995, the FTC and DOJ jointly drafted a Model Second Request that *may* be used by agency staff to determine whether the agencies should seek an injunction or enter negotiations for a consent decree.⁶⁹ The agencies generally encourage staff members to use the Model Second Request and to modify it depending on the details of the particular transaction⁷⁰ because it is broad in scope and requires extensive amounts of detailed information.⁷¹

agencies has established procedures for reviewing the HSR filings that may differ from the other agency. *Id.* at 117–25.

⁶³ 15 U.S.C. § 18a(b)(2) (2000) (permitting the agencies to grant early termination of HSR investigations).

⁶⁴ AMERICAN BAR ASSOCIATION, *supra* note 62, at 117.

⁶⁵ 15 U.S.C. § 18a(e) (2000); 16 C.F.R. § 803.20(c) (2005).

⁶⁶ AMERICAN BAR ASSOCIATION, *supra* note 62, at 137.

⁶⁷ 15 U.S.C. § 18a(e) (2000); 16 C.F.R. § 803.20(c) (2005). For tender offers and bankruptcy acquisitions, the automatic stay is ten days, rather than thirty days. *Id.*

⁶⁸ FTC Statement of Basis and Purpose, 43 Fed. Reg. 33,508 (July 31, 1978) (stating that “[a]nything less than a complete response [to a Second Request] is not substantial compliance”).

⁶⁹ Federal Trade Commission & U.S. Department of Justice, Model Request for Additional Information and Documentary Material, *Hart-Scott-Rodino Premerger Program Improvements* (Mar. 23, 1995), reprinted in 6 Trade Reg. Rep. (CCH) ¶ 42,521 (Mar. 28, 1995), also available at <http://www.ftc.gov/bc/modelguide.htm> [hereinafter Model Second Request].

⁷⁰ Federal Trade Commission, Guidance for Federal Merger Investigations and Complying with “Second Requests,” Section V(E)(3), Dec. 2000, available at <http://www.ftc.gov/bc/bestpractices/mergerguidelines.pdf> (“Staff should be forthcoming about the issues of concern. Because the scope of second requests is often broad, staff

2. Congressional Intent

Congress enacted HSR in 1976 to strengthen antitrust enforcement.⁷² It recognized that, despite the antitrust agencies' litigation success on the issue of liability,⁷³ the agencies were often unable to obtain adequate relief in these cases, because the transactions were so complex that they were "difficult at best, and frequently impossible" to "unscramble" after consummation.⁷⁴ Congress, however, did not intend to confer unlimited review power upon the agencies. For example, Congressman Rodino, one of the bill's primary sponsors, cautioned that the premerger notification provisions of HSR were intended to apply only to "the very largest corporate mergers—about the 150 largest out of the thousands that take place every year."⁷⁵ Congressmen believed that HSR would provide the antitrust agencies with sufficient advance notice of these complex deals and readily available information to enable the agencies to quickly analyze the merger proposals for any potential anticompetitive effects and determine whether seeking injunctive relief from the courts was justified.⁷⁶ Essentially, the premerger notification process enabled the agencies, with approval of the courts, to halt the transaction before the merging firms' assets, operations, and management were, "in effect, irreversibly 'scrambled' together."⁷⁷

should be willing to modify requests that are not likely to be relevant to the investigation or resolution of staff's concerns.").

⁷¹ *Id.* (noting that the scope is often "broad"); Model Second Request, *supra* note 69, at 1–5. *See infra* notes 121–26 and accompanying text.

⁷² *See* Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified as amended at 15 U.S.C. § 18a (2000)).

⁷³ *See* *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) (noting that, before the Warren Court, the government always prevailed on the issue of liability in merger litigation).

⁷⁴ H.R. REP. NO. 94-1373, at 8 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 2572, 2640–41.

⁷⁵ *Id.* at 11; *see* Sims & Herman, *supra* note 10, at 877–78 (noting that congressional statements clearly indicated the limited applicability of the HSR provisions to the largest transactions). Joe Sims is a former Deputy Assistant Attorney General in the Antitrust Division of the DOJ from 1974–1978 and participated extensively in the negotiations and deliberations on the provisions of HSR. *Id.* at 865 n.3. Although some of the authors' concerns expressed in the article may have been somewhat alleviated with the 2000 amendments to the HSR Act, the main proposition of the article—that the HSR has been utilized against congressional intent and is still in need of reform—is still supported. *See, e.g.,* Bhagwat, *supra* note 38, at 1322–24; Howell, *supra* note 1, at 1745.

⁷⁶ Sims & Herman, *supra* note 10, at 877–79.

⁷⁷ H.R. REP. NO. 94-1373, at 8 (1976).

Notably absent from HSR was a *permanent* automatic stay provision. Members of the Senate,⁷⁸ the House of Representatives,⁷⁹ the agencies,⁸⁰ and the business world,⁸¹ all opposed a statutory provision that would have enabled unilateral agency enforcement.⁸² Accordingly, a permanent automatic stay provision that was originally included in the HSR bill was removed before leaving the Senate.⁸³ Even subsequent review by a federal court was rejected as being sufficient protection against overenforcement by the agencies if they had the capability to impose an automatic stay.⁸⁴

Because the initial premerger notice submitted by the parties contains limited types of information,⁸⁵ Congress recognized that further factual investigation may be needed to assess the antitrust implications of certain mergers and, therefore, provided the Second Request process to obtain a “reasonable” amount of additional information.⁸⁶ Representative Rodino, in the Conference Report for the bill, noted that “the Government will be

⁷⁸ See, e.g., 122 CONG. REC. 16,911, 16,915 (1976) (statement of Sen. McClure, rejecting an automatic stay provision because “arbitrary and absolute enforcement agency power to stop and kill business transactions which are not inherently unlawful is at war with the most fundamental traditions of our jurisprudence”); *id.* at 17,563 (statement of Sen. Hruska, rejecting an automatic stay provision because “it is anathema, and that is to speak of it as charitably as possible, because it would have fixed in the hands of an individual within the [DOJ] the capability and the potential of prohibiting any and all mergers upon which he would cast a baleful eye”).

⁷⁹ *Id.* at 25,052 (statement of Rep. Rodino that “[the] bill makes no changes in the substantive law of mergers”); *id.* (statement of Rep. Hughes: “I wish to stress that the legislation makes procedural, rather than substantive changes in the Nation’s antitrust laws”); *id.* at 25,055 (statement of Rep. McClory: “This bill does not change the substance of the merger law at all”).

⁸⁰ *Id.* at 16,911, 16,916 (statement of Deputy Attorney General Tyler that “[t]he administration does not support enactment of [a] premerger stay provision”); *id.* (statement by FTC Chairman Engman) (“[W]e think the burden should be on us to make the challenge. Rather than mandating a court, upon application of the enforcement agency, to enter an order prohibiting consummation of a merger pending final judgment, the law should permit a court to require a showing by the Government of probable illegality.”) (emphasis omitted).

⁸¹ Sims & Herman, *supra* note 10, at 875 (characterizing the business community’s response to the provisions as “vehemently opposed”).

⁸² *Id.* at 874–76.

⁸³ 122 CONG. REC. 17,426 (1976); Sims & Herman, *supra* note 10, at 874–76.

⁸⁴ Sims & Herman, *supra* note 10, at 874–76 (noting that the original HSR provisions included an automatic stay provision that could be challenged in court, with the burden of proof on the defendant to show that the preliminary injunction was wrongfully imposed).

⁸⁵ See *supra* notes 57–63 and accompanying text.

⁸⁶ 122 CONG. REC. 30,877 (1976) (statement of Rep. Rodino).

requesting the very data that is *already* available to the merging parties, and has *already* been assembled and analyzed by them.”⁸⁷ As a result, the “substantial compliance” requirement was expressly incorporated into the statute⁸⁸ to limit the amount of information requested by the FTC and DOJ during a Second Request. During congressional discussions, Representative Rodino further noted:

[L]engthy delays and extended searches should . . . be rare. It was, after all, the prospect of protracted delays of many months—which might effectively “kill” most mergers—which led to the deletion . . . of the “automatic stay” provisions originally contained in both bills. To interpret the requirement of substantial compliance so as to reverse this clear legislative determination would clearly constitute a misinterpretation of this bill.⁸⁹

3. *Department of Justice and Federal Trade Commission Implementation*

Within two years, the agencies determined that “[a]nything less than a complete response [to a Second Request] is not substantial compliance.”⁹⁰ The agencies also concluded that the second statutory waiting period—automatically imposed upon the issuance of a Second Request—does not begin to run until the agencies themselves determine that the companies involved have substantially complied with the Second Request.⁹¹ The combination of these rules, promulgated by the FTC and DOJ, effectively bestows upon the agencies the power to unilaterally issue, without subsequent review by a court or any other neutral arbiter, an automatic stay indefinitely for any transaction qualifying for advance notice under HSR.⁹² This extraordinary block of power was explicitly rejected by Congress⁹³ when it enacted HSR and was even deemed inappropriate by senior officials within both agencies during congressional hearings.⁹⁴ Because the agencies subsequently asserted the very power they once rejected, judicially crafted

⁸⁷ *Id.* (emphasis added).

⁸⁸ 15 U.S.C. § 18a(g)(2) (2000); *see also supra* notes 67–68 and accompanying text.

⁸⁹ 122 CONG. REC. 30,877 (1976).

⁹⁰ FTC Statement of Basis and Purpose, 43 Fed. Reg. 33,508 (July 31, 1978).

⁹¹ 16 C.F.R. § 803.10(c)(2) (2005).

⁹² Sims & Herman, *supra* note 10, at 881.

⁹³ *See supra* notes 78–84 and accompanying text; *see also* Sims & Herman, *supra* note 10, at 881.

⁹⁴ *See supra* note 80 and accompanying text.

“merger enforcement” has been unilaterally replaced by a privatized⁹⁵ scheme of administrative “merger regulation.”⁹⁶ Within the past decade, even Supreme Court opinions considering substantive merger and acquisition enforcement issues have been “widely” characterized as “obsolete.”⁹⁷ In essence, agency guidelines “now enjoy considerably greater stature than the case law”⁹⁸ and merging parties are forced to consider whether a proposed

⁹⁵ Warren S. Grimes, *Transparency in Federal Antitrust*, 51 BUFF. L. REV. 937, 943 (citing Thomas M. Jorde, *Coping with the Merger Guidelines and the Government's "Fix-It-First" Approach: A Modest Appeal for More Information*, 32 ANTITRUST BULL. 579, 594 (1987)) (describing the consolidation of HSR practice by a few firms, primarily in Washington D.C. and New York, as creating a “barrier to knowledge . . . that can foster an elitist and difficult-to-enter specialty within the private bar”). The barriers to knowledge are largely attributable to the HSR provisions that require confidentiality of submitted documents in a large number of instances:

Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under section 552 of title 5, United States Code, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding.

15 U.S.C. § 18a(h) (2000). Disclosure, however, may be made to a committee or subcommittee of Congress. *Id.* Consequently, attorneys with prior experience with HSR filings are, understandably, sought for their personal experience, resulting in a concentration of the HSR practice in a relatively small number of law firms.

⁹⁶ Sims & McFalls, *supra* note 12, at 934 (noting the deliberate use of the term “merger regulation” to characterize the DOJ and FTCs’ exercise of power in considering the anticompetitive effects of proposed mergers and acquisitions because the current practice resembles standard economic regulation more than traditional law enforcement); Sims & Herman, *supra* note 10, at 865 (stating that the HSR is “the most important factor in the replacement of merger control through litigation with a comprehensive scheme of merger regulation”); Grimes, *supra* note 95, at 939 (criticizing the HSR and subsequent acts by the DOJ and FTC for greatly reducing the “transparency” of merger review by privatizing antitrust law).

⁹⁷ Daniel J. Gifford, *The Jurisprudence of Antitrust*, 48 SMU L. REV. 1677, 1680 (1995) (claiming that Supreme Court precedents regarding substantive merger issues “embrace archaic positions which are widely recognized as no longer valid”); *see also* ANTITRUST REVOLUTION, *supra* note 23, at 14 (noting that the Supreme Court has not decided a case involving a government challenge to a merger since 1974).

⁹⁸ Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383, 1404 (1998) (discussing the importance of the agencies’ published guidelines as being the most influential force on antitrust law, primarily due to the importance of obtaining “prompt clearance” by the governmental agencies). Substantive merger issues have not been decided by the Supreme Court since the enactment of HSR in 1976. *See id.* at 1424–25 (discussing the less prominent role of Supreme Court opinions in antitrust law, not only in merger enforcement, but across the board); Scott A. Sher, *Closed but Not Forgotten: Government Review of Consummated*

transaction will please the current staff and officials of the FTC and DOJ,⁹⁹ rather than the judiciary's interpretation of the law.

Initially conceived as a means for obtaining readily available information when the initial HSR filings indicate an increased likelihood of an antitrust violation,¹⁰⁰ the Second Request process has blossomed into a de facto injunction.¹⁰¹ This utilization of the Second Request process clearly has benefits, as well as significant costs.

III. BENEFITS OF THE CURRENT SYSTEM

The current system of merger regulation by the antitrust agencies provides several benefits.¹⁰² "Premerger notific[a]tion is not an end in itself. Its value lies in its demonstrated ability to improve our substantive review of mergers under the Clayton Act."¹⁰³ The value of the HSR Second Request process, therefore, may be considered in relation to the agencies' ability to substantively review and challenge mergers and acquisitions with potentially anticompetitive effects. The HSR provisions create value in this context in three general ways: (1) advance notice of complex transactions preserves adequate relief for the government when it successfully prosecutes a case,

Mergers Under Section 7 of the Clayton Act, 45 SANTA CLARA L. REV. 41, 55-95 (2004) (discussing the various ways in which case law relating to Section 7 of the Clayton Act is outdated); see also *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 486 (1974).

⁹⁹ A. Douglas Melamed, *Antitrust: The New Regulation*, ANTITRUST, Fall 1995, at 13.

¹⁰⁰ See 122 CONG. REC. 30,877 (1976) (regarding the purpose of the HSR Act, according to one of its primary sponsors).

¹⁰¹ Sims & Herman, *supra* note 10, at 881 (explaining that burdensome Second Requests issued by the agencies often serve as de facto injunctions, which prohibit consummation of the proposed transaction indefinitely).

¹⁰² For an extensive discussion of the benefits of the current merger regulation practices by the FTC and DOJ, see Baer, *supra* note 38, at 825-62. Baer is a former Director of the Bureau of Competition of the Federal Trade Commission. In the article, Baer defends the current practices of the agencies, including their utilization of the HSR Second Request, by reviewing twenty years of enforcement under the HSR provisions. He concludes that the presence of the HSR provisions and their employment are more beneficial to the national interests in preventing anticompetitive mergers and acquisitions than they are detrimental to the various actors. *But see* Sims & Herman, *supra* note 10, at 865-69 (rejecting the position of Baer, and claiming that major reform of various portions of the HSR, including the Second Request procedure, is necessary).

¹⁰³ James W. Mullenix, *The Premerger Notification Program at the Federal Trade Commission*, 57 ANTITRUST L.J. 125, 130-31 (1988) (discussing the importance of premerger notification in the enforcement of the antitrust laws).

because the firms are not already inextricably intertwined;¹⁰⁴ (2) statutory waiting periods provide time for a more thorough and accurate analysis of the antitrust implications;¹⁰⁵ and (3) ex ante regulation and discovery reduces the time and expenses associated with post-acquisition litigation.¹⁰⁶ Along these lines, increased agency bargaining leverage¹⁰⁷ and more extensive discovery than provided by normal discovery processes under the Federal Rules of Civil Procedure¹⁰⁸ may also benefit consumers.¹⁰⁹

According to the FTC and DOJ, merger review by the agencies substantially benefits consumers. For example, in 1999 alone, the staff and senior officials of the two agencies reported a consumer¹¹⁰ benefit of \$5.2 billion.¹¹¹ Although these estimates are inherently speculative, they do not measure the net benefit conferred by the agencies' use of the Second Request

¹⁰⁴ See FED. TRADE COMM'N, THE TWENTY-SECOND ANNUAL REPORT TO CONGRESS REGARDING THE HART-SCOTT-RODINO (HSR) PREMERGER NOTIFICATION PROGRAM 26 (1999).

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ Sims & McFalls, *supra* note 12, at 935–36 (acknowledging the institutional benefits of increased bargaining leverage, from the perspective of the agencies).

¹⁰⁸ Sims & Herman, *supra* note 10, at 881–82 (citing Malcolm R. Pfunder, *Premerger Notification After One Year: An FTC Staff Perspective*, 48 ANTITRUST L.J. 1471, 1496 (1979)) (noting that the government's discovery is limited by court review under the Federal Rules of Civil Procedure, but that it may be unlimited, and forced, under the guise of a Second Request). Malcolm Pfunder drafted many of the HSR regulations promulgated by the agencies, and commented at their inception: "It is my impression that the government is able to obtain more and better information more quickly under Hart-Scott-Rodino than it could using conventional discovery techniques." Malcolm R. Pfunder, *Premerger Notification After One Year: An FTC Staff Perspective*, 48 ANTITRUST L.J. 1471, 1496 (1979).

¹⁰⁹ It is debatable whether governmental avoidance of established procedures can properly be considered a benefit, especially when the increase in bargaining leverage and discovery is often criticized as overenforcement. See, e.g., Joe Sims, *Appraising DOJ's New Initiative for Pre-Merger Review*, LEGAL BACKGROUNDER, Feb. 8, 2002, at 3.

¹¹⁰ William Baer, former Director of the Bureau of Competition of the Federal Trade Commission, claims that the business world is also benefited. See Baer, *supra* note 38, at 825–26.

¹¹¹ ANTITRUST DIV., DEP'T OF JUSTICE, FY2000 CONGRESSIONAL BUDGET SUBMISSION 64 (1999), reprinted in *Appropriations for 2000: Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies of the H. Comm. on Appropriations*, 106th Cong. 745 (1999) (estimating DOJ-created savings of \$4 billion); *The Antitrust Enforcement Agencies: The Bureau of Competition of the Federal Trade Comm'n and the Antitrust Div. of the Dep't of Justice: Hearing Before the Comm. on the Judiciary*, 106th Cong. 13 (1999) (statement of Chairman Pitofsky) (estimating FTC-created savings of \$1.2 billion).

process,¹¹² and include savings created by the entire premerger notification process and enforcement mechanism, for example, forced divestitures, it is likely that the types of benefits discussed above provide at least some utility, even if the benefits are outweighed by the costs.¹¹³

IV. PROBLEMS WITH THE CURRENT SYSTEM

A. *Introduction*

The exercise of unfettered discretion by the FTC and DOJ exposed several flaws of HSR: (1) lack of external constraint upon the decision-making authority of the DOJ and FTC permits overenforcement; (2) lengthy time delays may effectively prevent a deal from closing, or even from being proposed; (3) companies incur significant compliance expenses, often in excess of several million dollars; and (4) receipt of a Second Request may create disclosure obligations.¹¹⁴ Depending on one's viewpoint about judicially crafted antitrust policy, another problem with the current system is that courts are precluded from reviewing merger proposals that may actually be procompetitive. Moreover, by utilizing the Second Request as a de facto injunction, the agencies may have prevented mergers that would ultimately benefit consumers through increased innovation, increased supply, or lower prices.¹¹⁵ Finally, there is likely a deterrent effect that prevents potentially procompetitive transactions from even being proposed.

B. *Lack of External Constraints on the DOJ and FTC*

The lack of external constraints upon the DOJ and FTC decision-making process is one of the most significant flaws of the current Second Request process because it often leads to and compounds other problems—burdensome time delays, expenses, and disclosure obligations. Congress and the judiciary recognized the need for general legislation to combat a broad

¹¹² Because the transactions never closed, they are inherently speculative. Moreover, the numbers provided by the FTC and DOJ calculated the amount of savings to consumers; they did not account for the direct and indirect costs imposed upon the companies. Therefore, the estimates do not provide the net benefit, if any, of the Second Request process.

¹¹³ See Sims & Herman, *supra* note 10, at 885–99 (discussing the benefits and costs of the current system, and concluding that the HSR Act is in need of reform).

¹¹⁴ See *infra* Parts IV.B–E.

¹¹⁵ See *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 501 (1974) (noting that two functions of the federal antitrust laws are to limit price increases and encourage innovation).

category of innovative anticompetitive trade practices.¹¹⁶ Consequently, both the Sherman Act and the Clayton Act were very general pieces of legislative ambiguity.¹¹⁷ Not surprisingly, when the DOJ and FTC were given authority to enforce the antitrust laws,¹¹⁸ they quickly claimed as much power as possible under the statutes. Subsequent congressional compromises¹¹⁹ and internalization of the system by the agencies and companies¹²⁰ firmly established the agencies' practices, thereby leading to the tremendous block of power currently exercised by the FTC and DOJ—the ability to unilaterally impose substantive judgment upon a transaction by utilizing the Second Request process as a *de facto* injunction, without being subject to judicial review.

Because of this lack of external constraint, even the Model Second Request requires submission of a vast amount of detailed information.¹²¹ DOJ and FTC staff attorneys have little incentive to modify the Model Second Request, although they are encouraged to do so,¹²² when increased disclosure and extended periods of review reduce their risk of error and they are not subject to any external restraints. Consequently, regardless of the

¹¹⁶ See 15 U.S.C. § 18 (2000) (proscribing acquisitions where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly”); *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 327–42 (1897) (representing one of the Supreme Court’s most expansive views of the term “every” in Section 1 of the Sherman Act); see also 15 U.S.C. § 1 (2000) (condemning “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . .”); Grimes, *supra* note 95, at 940 (discussing the “law of unintended consequences” applied to HSR, which is described as “overly broad”). When debating the enactment of the FTC and Clayton Acts, Congress noted the necessity of general legislation in the Conference Committee Report: “It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. . . . If Congress were to adopt the method of definition, it would undertake an endless task.” H.R. REP. NO. 63-1142, at 19 (1914).

¹¹⁷ See Grimes, *supra* note 95, at 940.

¹¹⁸ See *supra* notes 23–33 and accompanying text.

¹¹⁹ Sims, *supra* note 109, at 1 (discussing the business community’s embrace of higher initial filing thresholds by Congress, in exchange for postponing Second Request reform).

¹²⁰ Sims & Herman, *supra* note 10, at 883, 888 (recognizing the private nature of HSR practice because of the prevalence of consent decrees, confidentiality rules, and dearth of litigation, and predicting a lack of “long-term intelligent policymaking” will result).

¹²¹ See Model Second Request, *supra* note 69.

¹²² Guidance, *supra* note 70, at § V(E)(3) (“Staff should be forthcoming about the issues of concern. Because the scope of second requests is often broad, staff should be willing to modify requests that are not likely to be relevant to the investigation or resolution of staff’s concerns.”).

specific transaction's particularities, parties are often required to submit the following detailed information in response to a Second Request investigation: (1) organizational charts; (2) personnel directories; (3) lists of all agents and representatives; (4) products manufactured and/or sold; (5) the amount of sales in each relevant market area; (6) customer lists; (7) locations of facilities; (8) promotional materials for each product; (9) market studies; (10) forecasts; (11) surveys; (12) customer complaints; (13) past and present lawsuits; (14) federal and state investigations; (15) pricing lists; (16) competitor lists; (17) descriptions of competitors' products and facilities; (18) costs of production; (19) potential barriers to entry into the market; (20) future construction plans; (21) the amount of imports and exports; (22) membership in trade associations and information services; (23) other potential transactions involving acquisitions or divestitures; (24) potential legal ramifications in other areas of law; and (25) the companies' procedures regarding the maintenance of business records.¹²³ These submissions are incorporated into the Model Second Request and are generally required for each Second Request investigation.¹²⁴ Moreover, within each specification, agency staff typically requires detailed breakdowns of the information.¹²⁵ For example, Model Specification 2 requires "a list of all agents and representatives of the company, including, but not limited to, all attorneys, consultants, investment bankers, product distributors, sales agents, and other persons retained by the company in any capacity relating to any subject and any relevant product covered by this Request. . . ."¹²⁶

These broad requests for information are due, at least in part, to a lack of external constraints upon the DOJ and FTC. This investigative barrage has enabled the agencies to effectively delay a transaction without being subject to review. Some have even criticized the agencies for utilizing the Second Request investigation as a means of achieving nearly unlimited discovery in preparation for litigation, rather than simply obtaining the information necessary to make an initial determination as to whether a proposed transaction has a likelihood of resulting in anticompetitive effects, and then proceeding with normal discovery procedures.¹²⁷ Without judicial oversight or statutory limitations, the practices are likely to continue.¹²⁸

¹²³ See Model Second Request, *supra* note 69, at Specifications 1–16.

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ *Id.* at Specification 2.

¹²⁷ Sims & Herman, *supra* note 10, at 868–69.

¹²⁸ The agencies, after the 2000 amendments to HSR, were required to establish a procedure for internal review of allegedly overbroad Second Requests. See 15 U.S.C. § 18a(e)(1)(B) (2000). The agencies should be commended for establishing these review

C. Time

Time is of the essence in many, if not all, of the mergers and acquisitions subject to the HSR filing requirements.¹²⁹ Debt-financing, valuation problems, business operations risks, stock price volatility, and the avoidance of anti-takeover defenses in a hostile takeover are important reasons for completing a transaction in a relatively short period of time.¹³⁰ The Supreme Court has explicitly recognized the costs of delay in the context of an acquisition, as well as congressional intent to restrict the amount of delay imposed under several of the federal statutes that affect mergers.¹³¹ HSR's sponsors also recognized these factors in 1976 and, accordingly, incorporated express time limits into the statute to restrict the agencies' ability to review merger proposals and to make their determination as to whether to formally

procedures by senior officials within the agencies and for continuing review of their practices; however, the changes do not impose a significant external constraint. In fact, the effect may be that the agency practices become further entrenched.

¹²⁹ 122 CONG. REC. 30,877 (1976) (statement of Rep. Rodino noting that protracted delays may effectively "kill" many of these transactions).

¹³⁰ See Howell, *supra* note 1, at 1728–29. Transactions subject to the HSR may also be affected by other legislation, such as the Williams Act of 1933, which also has statutory waiting periods. See 15 U.S.C. § § 78m(d)–(e), 78n(d)–(f) (2000). While they may impose costs associated with delaying a transaction, the statutory waiting periods provided in the Williams Act are generally shorter than the HSR waiting periods. See *infra* note 138 and accompanying text. If a Second Request is issued, the waiting period under the HSR can theoretically be extended indefinitely. See *infra* Part IV.C. As a result, HSR transactions do not generally incur additional timing delay costs because of the Williams Act.

¹³¹ *Edgar v. Mite Corp.*, 457 U.S. 624, 637 (1982) (holding that an Illinois antitakeover statute which imposed a statutory waiting period that exceeded the waiting period provided by the Williams Act was preempted by the federal law). The Court expressed concern that under the Illinois statute, the Illinois Secretary of State had "the power to delay a tender offer indefinitely," *id.*, a concern that seems to undercut the current practices of the FTC and DOJ under the HSR Act. The Court, in striking down the Illinois statute, stated: "[i]n enacting the Williams Act, Congress itself 'recognized that delay can seriously impede a tender offer' and sought to avoid it." *Id.* (citing *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1277 (5th Cir. 1978); S. REP. NO. 90-550, at 4 n.13 (1967)). Delay has even been characterized as the most important weapon in a hostile acquisition, that is, where the acquisition is opposed by the target's board of directors. See, e.g., Donald C. Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213, 238 (1977); Herbert M. Wachtell, *Special Tender Offer Litigation Tactics*, 32 BUS. L. 1433, 1437–42 (1977). The *Edgar* Court, even though the case involved preemption of the Illinois statute by the Williams Act, also noted that Congress reemphasized the consequences of delay in a transaction when it enacted the HSR Act in 1976. *Edgar*, 457 U.S. at 638.

initiate litigation to obtain a court-ordered preliminary injunction.¹³² The key, however, is that the drafters of HSR also felt that the Second Request process rarely would be used by the agencies,¹³³ and when it was, that it would be limited in scope to information that was already prepared by the companies and readily available for conveyance to the FTC and DOJ without significant burdens.¹³⁴ Once the agencies declared that "substantial compliance" required full compliance¹³⁵ and that the statutory waiting period would not begin until a Second Request was fully complied with,¹³⁶ the time limits were effectively eviscerated. Time-sensitive acquisitions that were originally supposed to be reviewed within a twenty-day period could be delayed for several months.¹³⁷ As of May 2005, receipt of a Second Request

¹³² See *supra* notes 61, 67, and accompanying text (describing congressional testimony about the inclusion of an automatic stay provision in the HSR and the twenty-day statutory waiting period that was subsequently amended to thirty days).

¹³³ See *supra* notes 87, 89 and accompanying text (statement of Rep. Rodino describing the unusual occurrence and limited scope of Second Requests in merger investigations).

¹³⁴ See *id.*

¹³⁵ 16 C.F.R. § 803.20(a)(2) (2005).

¹³⁶ 16 C.F.R. § 803.10 (2005).

¹³⁷ See James Lowe, *US Tightens Net on Merger Reporting: The Hart-Scott-Rodino Act Has Been the Cornerstone of Merger Control in the US for 25 Years*, INT'L FIN. L. REV., May 1, 2001, at 22 (noting that responses to Second Requests can take anywhere from several weeks to several months); Dan Wellington, *Major Changes to the Hart-Scott-Rodino Act*, TEX. LAW., Apr. 30, 2001, at 44 (declaring that Second Requests can be a "monstrous demand for documents and information taking months to fulfill"); David B. Stratton & Barbara T. Sicalides, *News at 11: Bankruptcy and Antitrust Law: What You Don't Know Can Hurt You*, AM. BANKR. INST. J., Sept. 2004, at 34 (stating that, because Second Requests typically include extensive interrogatories, document requests, and depositions of personnel, it often takes more than six months and several million dollars to comply with agency requests). Even senior agency officials admit that the Second Request process often takes months to complete. See, e.g., Richard G. Parker, Dir. Bureau of Competition, Fed. Trade Comm'n, Prepared Remarks at the Spring 2000 Meeting of the American Bar Association Federal Trade Commission Committee (Apr. 7, 2000), <http://www.ftc.gov/speeches/other/rparkersspringaba00.htm> (claiming that most Second Request investigations are completed within four months).

At least one Second Request investigation lasted nearly an entire year before a consent decree was entered. See Sims & McFalls, *supra* note 12, at 935 (providing the AOL/Time Warner investigation as an example of the DOJ and FTC's current practice under the HSR). Sims represented America Online, Inc., in the combination with Time Warner. *Id.* at 938 n.14. See also *In re America Online, Inc.*, No. C-3989, 2001 FTC LEXIS 44 (Apr. 17, 2001). Sims claims that, given the legal theories and facts involved in the transaction, "the FTC almost certainly would have failed to obtain injunctive relief necessary to prevent the merger." Sims & McFalls, *supra* note 12, at 940 n.16. Moreover, even if a transaction survives a Second Request investigation, parties are often coerced

prolongs agency review by an average of six months.¹³⁸ Extremely complex deals, however, can require more than a year for parties to comply with a Second Request.¹³⁹

D. Direct Expenses

Another consequence of the Second Request process, somewhat related to delays in completing a transaction, is the cost of complying with an investigation. On average, compliance with Second Requests costs merger parties \$5 million; however, it is not uncommon for complex transactions to result in compliance costs upwards of \$20 million.¹⁴⁰ For example, the Exxon-Mobil merger reportedly cost *one* of the parties more than \$30 million to comply with the agency's Second Request.¹⁴¹

Many of the common expenses associated with a response include research, compilation, and duplication expenses.¹⁴² In some cases, electronic production is the biggest expense because companies are "paying for sophisticated document-scanning and management software and the people to run it, or installing dedicated high-speed data connections to regulators' offices in order to transfer information."¹⁴³ Companies may even rent expensive warehouse space to store the documents and provide access to agency staff, "even though much of it ends up boxed and unread by the agencies that demanded it."¹⁴⁴ It is not uncommon for the filings to entail the production of thousands of boxes loaded with documents, with one case reportedly requiring over 8,000 document boxes, which were later returned to the company largely unopened after the investigation was completed.¹⁴⁵

Another example of a burdensome Second Request is McCormick & Co.'s attempted purchase of Spice Island's assets. The FTC expressed anticompetitive concerns about the deal after receiving the initial HSR

into agreeing to overreaching remedies because prolonged litigation would cost "(1) more months of delay and (2) likely a significant interim market penalty." *Id.* at 938.

¹³⁸ Cecile Kohrs Lindell, *Majoras Hopes to Streamline Reviews*, THE DAILY DEAL, May 11, 2005 (noting that the FTC's new chairman is seeking to reform the Second Request process and providing the average time and cost for complying with a Second Request).

¹³⁹ *Id.*

¹⁴⁰ *Id.*; see also Sims & Herman, *supra* note 10, at 890–92.

¹⁴¹ Cecile Kohrs Lindell, *When Once Is Not Enough*, THE DAILY DEAL, Apr. 25, 2005 (noting that "[a] corporate merger is rarely a cakewalk, but there are two little words that can make it immeasurably harder: 'a second request'").

¹⁴² Sims & Herman, *supra* note 10, at 890–92.

¹⁴³ Lindell, *supra* note 141.

¹⁴⁴ *Id.*

¹⁴⁵ Sims & Herman, *supra* note 10, at 886. Further details are not provided.

premerger notice and, therefore, issued a Second Request to the parties.¹⁴⁶ When McCormick & Co. attempted to proceed with the acquisition, the FTC sought a court-ordered preliminary injunction.¹⁴⁷ The FTC claimed, despite receiving over 120,000 pages of documents from McCormick & Co., that the company had not substantially complied with the Second Request.¹⁴⁸ Facing increased scrutiny, the deal was abandoned.¹⁴⁹

Second Request compliance expenses also commonly include salaries of employees, including high-ranking executives, and attorneys' fees.¹⁵⁰ Executives must often spend large amounts of time producing documents, responding to interrogatories, and testifying at depositions.¹⁵¹ Moreover, given the administratively heavy nature of the Second Request process, large sums of money are spent on attorneys' fees to encourage expeditious compliance with the law and negotiation of acceptable remedies should the DOJ or FTC continue to have anticompetitive concerns as the investigation progresses.¹⁵² As a result, it is not uncommon for firms to spend several million dollars responding to an investigation.¹⁵³

E. Continuous Disclosure

Finally, the Second Request process may create significant disclosure obligations for the parties involved. Before a company can substantially comply with a Second Request investigation, the agencies generally demand that all materially relevant information—which the agencies tend to interpret very broadly¹⁵⁴—be made available to the agency staff as soon as it develops or is created.¹⁵⁵ Item N of the Model Second Request states:

This request shall be deemed continuing in nature so as to require production of all documents *responsive to any specification included in this Request* produced or obtained by the company up to thirty calendar days prior to the date of the company's full compliance with this Request,

¹⁴⁶ FTC v. McCormick & Co., 1988-1 Trade Cases (CCH) para. 67,976 (D.D.C. 1988); ARTHUR FLEISCHER, JR. & ALEX SUSSMAN, TAKEOVER DEFENSE § 12.05(c), at 38 (Supp. 2001).

¹⁴⁷ *McCormick*, 1988-1 Trade Cases (CCH) at para. 67,976.

¹⁴⁸ See FLEISCHER & SUSSMAN, *supra* note 146.

¹⁴⁹ *Id.*

¹⁵⁰ See Stratton & Sicalides, *supra* note 137, at 34.

¹⁵¹ *Id.*

¹⁵² See *id.*

¹⁵³ See Lindell, *supra* note 138.

¹⁵⁴ See *supra* Part IV.B.

¹⁵⁵ See Model Second Request, *supra* note 69, at Item N.

except: (1) for documents responsive to Specification 7 or Specification 15, for which the date is fourteen calendar days prior to the date of the company's full compliance with this Request; and (2) for documents that must be translated into English, for which the date is forty-five calendar days prior to the date of the company's full compliance with this Request.¹⁵⁶

Failure to comply with the continuous disclosure obligation prevents the Second Request investigation from concluding, thereby tolling commencement of the statutory waiting period,¹⁵⁷ possibly subjects the parties to a civil fine of up to \$10,000 per day,¹⁵⁸ and may increase the scrutiny of the agencies and the likelihood of them seeking injunctive relief to halt the transaction.

Receipt of a Second Request may also give rise to a duty to disclose its receipt to the public under the federal securities laws, because of the tremendous ramifications of receiving further investigation and its relatively high correlation with a transaction being officially challenged by the agencies.¹⁵⁹ Although the antitrust agencies themselves are clearly prohibited from disclosing a pending merger or its terms, nothing prevents the SEC from declaring the receipt of a Second Request to be material.¹⁶⁰ If the SEC made this declaration and a public company received a Second Request, the securities laws would then require the company to file an 8-K with the SEC,

¹⁵⁶ *Id.*

¹⁵⁷ See 16 C.F.R. § 803.10 (2005); 15 U.S.C. § 18a(b) (2000).

¹⁵⁸ 15 U.S.C. § 18a(g) (2000) (providing a civil penalty for HSR violations).

¹⁵⁹ Robert S. Schlossberg and Harry T. Robins, *Hart-Scott-Rodino Merger Investigations: A Guide for Safeguarding Business Secrets*, 56 BUS. LAW 943, 953 (2001) (stating that the duty to disclose the receipt of a Second Request depends on the facts and circumstances of a particular transaction). When the information would be relied upon by investors to make a buy or sell decision, a public announcement is generally required. *Id.* Because the issuance of a Second Request is highly correlated with a transaction being abandoned, resulting in a consent decree (that often requires divestiture of significant assets), or formal litigation, see Grimes, *supra* note 95, at 965 & tbl. 1, it is likely that an investor would rely on the information, thereby giving rise to a duty to disclose. Grimes notes that in recent years "well over 50% of second requests have led to enforcement action by the agency." *Id.* In Table 1, Grimes shows that, in the years 1998–2002, out of 188 Second Request investigations by the FTC, 44 transactions were permitted to proceed without modification, 39 transactions were abandoned by the parties, 87 were settled through consent decrees involving either restructuring of the companies or divestiture, and 18 proceeded to litigation. *Id.* at tbl. 1.

¹⁶⁰ Jaret Seiberg, *Uneven Ground*, THE DAILY DEAL, Jan. 11, 2005 (noting that material events require companies to file an 8-K with the SEC and that "materiality" is often an elusive concept).

which typically is accompanied by a press release.¹⁶¹ As a result, the HSR process may give rise to disclosure obligations to both the agencies and the public, further increasing the costs of compliance.

V. A METHOD FOR AVOIDING THE DE FACTO INJUNCTION?

Occasionally, companies that have received a Second Request embark on a risky venture to avoid a de facto injunction. For example, in Oracle's bid to acquire PeopleSoft, Inc. in 2004, Oracle CEO Larry Ellison provided certain information to the FTC in response to a Second Request, certified substantial compliance pursuant to the regulations promulgated under HSR,¹⁶² and then announced Oracle's intention to consummate the transaction in the near future.¹⁶³ This method forced the FTC to proceed to court and seek a preliminary injunction against Oracle,¹⁶⁴ or risk losing the preservation of an adequate remedy because Oracle and PeopleSoft would become inextricably intertwined. This effectively circumvented the de facto injunction and forced the FTC to justify its position before a neutral arbiter (the judiciary); however, this approach is extremely risky. Not only are the companies certain to incur litigation costs, but they are also subject to a fine of up to \$10,000 per day for HSR violations.¹⁶⁵ Fines occasionally reach several million dollars.¹⁶⁶

Another recent attempt by companies to avoid a Second Request de facto injunction involved Blockbuster's attempt to acquire Hollywood Entertainment Corporation (Hollywood).¹⁶⁷ On December 28, 2004, Blockbuster announced its intention to purchase all of the outstanding shares of Hollywood through a cash tender offer and also filed its premerger Notification and Report Form.¹⁶⁸ The FTC, on January 12, 2005, issued a

¹⁶¹ *Id.*

¹⁶² See 16 C.F.R. § 803.6 (2004) (requiring certification of compliance with Second Requests).

¹⁶³ See Defendant Oracle Corp.'s Statement re Disputed Issues, *United States v. Oracle Corp.*, No. C. 04-0807 VRW (N.D. Cal. Mar. 8, 2004).

¹⁶⁴ *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1175-76 (N.D. Cal. 2004) (holding that the government failed to show "by a preponderance of the evidence that the merger of Oracle and PeopleSoft is likely substantially to lessen competition" and, thus, denying injunctive relief).

¹⁶⁵ 15 U.S.C. § 18a(g) (2000).

¹⁶⁶ See *supra* note 60 and accompanying text.

¹⁶⁷ Fed. Trade Comm'n, *FTC Seeks Court Order to Force Blockbuster to Comply with Premerger Rules* (Mar. 4, 2005), available at <http://www.ftc.gov/opa/2005/03/blockbuster.htm>; see also Complaint, *supra* note 17.

¹⁶⁸ *Id.* at 3-4.

Second Request to Blockbuster to obtain additional information regarding potential antitrust issues.¹⁶⁹ A dispute arose regarding compliance with Specification 17 of the Second Request, which required data from each Blockbuster store relating to “pricing, non-price terms, incentive programs, late fees, membership fees, discounts, and other benefits offered to customers.”¹⁷⁰ Blockbuster provided some information in response to the Specification, but the FTC claimed that there were significant problems with Blockbuster’s electronic submission.¹⁷¹ The FTC asserted that a great deal of information provided to the agency was “incorrect” due to “programming error[s]” of Blockbuster¹⁷² and estimated that, based on the amount of data contained in Blockbuster’s additional submissions, the original submission omitted information regarding approximately 4,200 of the company’s 4,600 stores.¹⁷³ Blockbuster disputed the accuracy and omission of information and, therefore, certified compliance with the Second Request.¹⁷⁴ Despite two notices of deficiency being sent by the FTC to Blockbuster asserting that the company did not substantially comply with the Second Request,¹⁷⁵ Blockbuster publicly announced “its intention to effect its proposed acquisition of Hollywood as soon as possible, indicating that unless the Commission takes action by mid-March Blockbuster will go ahead with its acquisition and force the Commission to bring suit to stop the transaction.”¹⁷⁶ Given the February 4, 2005 certification of compliance date, Blockbuster could consummate the transaction on March 8, 2005, if injunctive relief from the courts was not granted.¹⁷⁷ However, the FTC sought injunctive relief from the United States District Court for the District of Columbia on March 4, 2005, and an Agreed Order was entered on March 9, 2005, extending the HSR waiting period until March 21, 2005.¹⁷⁸ The tactic circumvented the

¹⁶⁹ *Id.* at 5–6.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 6–7.

¹⁷² *Id.* at 6.

¹⁷³ Complaint, *supra* note 17, at 7.

¹⁷⁴ *Id.* at 5–6. Blockbuster’s Vice President and Senior Corporate Counsel, Judy C. Norris, certified compliance with the Second Request for the company. *Id.*

¹⁷⁵ *Id.* at 8–9.

¹⁷⁶ *Id.* at 9–10.

¹⁷⁷ *Id.* at 10.

¹⁷⁸ Complaint, *supra* note 17, at 1; Agreed Order Regarding Extension of Hart-Scott-Rodino Waiting Period, *FTC v. Blockbuster, Inc.*, No.: 1:05 CV 00464 (D.D.C. Mar. 9, 2005); *see also* Federal Trade Commission, *Blockbuster to Comply with FTC’s Premerger Rules* (Mar. 4, 2005), available at <http://www.ftc.gov/opa/2005/03/blockbuster2.htm>.

imposition of a de facto injunction, at least temporarily, but ultimately resulted in an extension of the waiting period.

VI. POSSIBLE SOLUTIONS

After reviewing the costs and benefits of the current Second Request process, many scholars and practitioners agree that the HSR provisions are in need of at least some reform.¹⁷⁹ Recent administrative changes¹⁸⁰ should be, and have been, commended for alleviating some of the burdens associated with the Second Request process; however, more reform is needed because the power to impose a de facto injunction remains in the good faith and unfettered discretion of the agencies, without any neutral, external constraints. Three possibilities for reform are: (1) expressly limiting the scope of information available in a Second Request investigation; (2) requiring the agencies to initiate formal litigation within a limited time period; and (3) creating a streamlined process of judicial review by an independent panel of experts.

A. *Limiting the Scope of Information*

Statutory limitations upon the information available in a Second Request investigation would likely reduce the burdens upon companies; however, it would seriously undermine the agencies' ability to conduct merger reviews effectively. As a result, antitrust enforcement would be both overinclusive and underinclusive. Because the FTC and DOJ are required to investigate anticompetitive issues in a variety of contexts,¹⁸¹ limitations upon the type of

¹⁷⁹ See Sims & Herman, *supra* note 10, at 880–84 (criticizing the HSR on several different fronts). But see, Baer, *supra* note 38, at 825–62 (defending the current practices).

¹⁸⁰ The FTC, in 2002, adopted a series of “Best Practices” that help alleviate the burdens of Second Request investigations by providing guidelines to parties and agency staff about the issuance of, and compliance with, a Second Request. Fed. Trade Comm’n, *Statement of the Federal Trade Commission’s Bureau of Competition on Guidelines for Merger Investigations*, Dec. 11, 2002, available at <http://www.ftc.gov/os/2002/12/bcguidelines021211.htm>. The DOJ adopted similar guidelines in 2000. Press Release, DOJ, Antitrust Division Announces Merger Review Process Improvements, Apr. 2000, available at http://www.usdoj.gov/atr/public/press_releases/2000/4511.pdf; see also ANTITRUST DIV., DOJ, REPORT TO CONGRESS REGARDING MERGER REVIEW PROCEDURES (2001), available at <http://www.usdoj.gov/atr/public/guidelines/8550.pdf> (discussing the implementation and results of the DOJ reforms).

¹⁸¹ For example, antitrust agencies are increasingly required to consider antitrust concerns on an international basis. Debra A. Valentine, *Cross-Border Canada/U.S.*

information available would almost certainly result in inadequacies at least occasionally. As a result, an increasing number of anticompetitive transactions would be able to slip through the cracks undetected.

On the other hand, limiting disclosure may also result in overprosecution by the agencies because they would likely attempt to minimize their risk of error. Thus, they would often initiate litigation in questionable cases and continue through at least discovery, which is widely recognized as an expensive process.¹⁸² Because the risk of under- and overinclusiveness associated with limiting the scope of information available to the companies would likely outweigh any savings, this seems to be an unlikely method of reform.

B. Limiting the Time Period for Deciding Whether to Challenge a Transaction

Statutory limitations upon the time period for determining whether to formally challenge a transaction would also substantially decrease the amount of uncertainty and cost that pervades a Second Request investigation. An express statutory provision that requires the FTC and DOJ to make their determination within thirty or sixty days would certainly be more succinct than the current process.¹⁸³

Similar to a limitation upon the scope of additional information that can be requested, however, the system would almost inevitably result in over- and underinclusiveness because the agencies would be forced to make their decisions on an expedited pace. As noted by Rep. Rodino when HSR was originally enacted, these are often extremely complex deals.¹⁸⁴ Because the economic analysis necessary to evaluate these deals would likely take more time as the complexity of transactions increases, the agencies would face a higher risk of error in pursuing injunctive relief. Moreover, it is also likely that a statutory maximum would, in practice, be used as a statutory minimum to which every deal would be subjected.

VII. EXPEDITED JUDICIAL REVIEW BY A PANEL OF EXPERTS

To remedy the problems with the current HSR Second Request practice, Congress should create a streamlined process of review by an independent

Cooperation in Investigations and Enforcement Actions, 26 CAN.-U.S. L.J. 271, 272 (2000) (estimating that, in the year 2000, one half of the Second Request investigations conducted by the FTC involved a foreign-based party, had important evidence located abroad, or implicated the divestiture of a foreign asset).

¹⁸² See Sims & Herman, *supra* note 10, at 898.

¹⁸³ See *supra* Part II.B.3.

¹⁸⁴ See *supra* notes 74–75 and accompanying text.

panel of experts. A similar proposal was briefly considered during the negotiations and deliberations of the 2000 HSR amendments, but was ultimately discarded.¹⁸⁵ Senator Hatch's amendment provided for judicial review of Second Requests issued by the agencies, but the provision was quickly abandoned by proponents of HSR reform¹⁸⁶ and the business world¹⁸⁷ to obtain more immediate relief for a larger number of transactions through larger initial filing thresholds.¹⁸⁸

In crafting a system of judicial review, the costs currently associated with HSR must be considered, as litigation itself is often time consuming and costly.¹⁸⁹ As a result, the following are key components of the proposed judicial review process: (1) an expedited period of review to ensure timely determination of the proper scope of the Second Request; (2) review by a panel of experts focused on antitrust litigation to properly balance concerns of the agencies and companies within the expedited timeframe; and (3) a burden of producing "clear and convincing" evidence that the Second Request issued by the DOJ or FTC is unreasonably burdensome on the merging companies to limit the amount of challenges and the corresponding costs of litigation. The process could also require the agencies, upon issuing a Second Request, to provide a detailed statement containing the factual, theoretical, and legal bases for requiring additional information.¹⁹⁰ For example, the European Union currently requires its merger enforcement agency, the Commission of the European Community, to provide this information before conducting a "Second Phase" investigation—the

¹⁸⁵ S. 1854, 106th Cong. (1999); see Michael F. Urbanski & James R. Creekmore, *Annual Survey of Virginia Law: Antitrust and Trade Regulation Law*, 34 U. RICH. L. REV. 647, 679 (2000) (discussing the proposed amendment that would have created a process for judicial review, albeit without any provisions for review by a panel of neutral experts, which would be an important facet of any review procedure given the complexity of antitrust analysis and the expedited period of review that would likely result from any reform, or heightened burdens of proof placed upon the defendant to challenge the issuance of a Second Request); see also Sims & McFalls, *supra* note 12, at 940 n.15 (criticizing the amendment because of the costs associated with litigation that would ensue because of the proposal's lack of restrictions); Sims, *supra* note 109, at 1–2 (discussing the Hatch Amendment).

¹⁸⁶ *Id.* at 1–2.

¹⁸⁷ *Id.*

¹⁸⁸ See 15 U.S.C. § 18a(a) (2000); Sims, *supra* note 109, at 1–2.

¹⁸⁹ See *supra* note 182 and accompanying text.

¹⁹⁰ See Dimitri Giotakos, *GE/Honeywell: A Theoretic Bundle Assessing Conglomerate Mergers Across the Atlantic*, 23 U. PA. J. INT'L ECON. L. 469, 507–08 (2002) (discussing the similarities and differences in merger enforcement between the United States and the European Union, including the importance of detailed factual statements as a useful tool to decrease burdens on the parties).

European Union's equivalent of the Second Request.¹⁹¹ This would enable the merging corporations to more accurately assess the likelihood of successfully challenging a Second Request under the proposed solution, thereby mitigating litigation expenses and the use of judicial resources.

A. Expedited Review

Expedited review must be a cornerstone of any effective Second Request reform because many of the costs associated with the process are caused by substantial delay in the effectuation of a merger.¹⁹² Because of the indefinite time delays inherent in a Second Request, merging companies often succumb to the pressure applied by the enforcement agencies and enter consent decrees that would otherwise be rejected if there had been a neutral arbiter monitoring the process.¹⁹³ Apparently, much of the business world currently views the forced divestiture of significant portions of their business as more attractive than spending enormous amounts of time and money achieving substantial compliance with a Second Request when the probable result is an enforcement action.¹⁹⁴ Consequently, any proposal should minimize time delays.

Internal review of a Second Request's scope is currently available within both the DOJ and FTC from a senior official not directly supervising the particular transaction.¹⁹⁵ While this process is seldom, if ever, used by parties in a merger¹⁹⁶ (possibly because they lack faith, rightly or wrongly, in the objectivity of officials within the agency whose action is being

¹⁹¹ *Id.* (citing Council Regulation 4064/89 EEC of 21 Dec. 1989 on the Control of Concentrations Between Undertakings, 1990 O.J. (L 257) 13, 17, *amended by* Council Regulation 1310/97 EC of June 30, 1997, 1998 O.J. (L 180) 6(1)(c)).

¹⁹² *See supra* Part IV.C. and accompanying text.

¹⁹³ *See* Sims & McFalls, *supra* note 12, at 938 (noting that parties often accept consent decrees that are more intrusive than would have been accepted with external constraints upon the agencies).

¹⁹⁴ *See* Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 137–38 (2002) (providing tables that show the number of reported HSR transactions, Second Requests, and enforcement actions that took place each year from 1981 to 2000). The statistics show that in the year 2000, out of 4749 HSR transactions reported, 98 of these transactions involved the issuance of a Second Request. *Id.* Of these 98 transactions involving a Second Request investigation, 80 resulted in an enforcement action—approximately 81.6%. *Id.*

¹⁹⁵ 15 U.S.C. § 18a(e) (2000).

¹⁹⁶ James F. Rill et al., *International Antitrust: Are Fixed Time Periods for Merger Review a Good Idea?*, INT'L FIN. L. REV., COMPETITION AND ANTITRUST 13, 17 (Supp. 2002) ("Not surprisingly the appeal process has been used sparingly—and with little success—by parties.").

questioned),¹⁹⁷ the expedited schedule of review provided in the regulations serves as a basis for the proposed judicial review. It should involve a series of compacted periods for submitting complaints of overly burdensome requests, responses by the appropriate government agency, and review by the panel. Internal reform by the DOJ created a five-day response period for responding to requests for modifications to alleged unreasonably burdensome requests.¹⁹⁸ Discussions regarding modification of a request, however, may take additional time depending on the complexity of issues involved.¹⁹⁹ The FTC made similar changes within its Second Request framework as well, with senior officials reviewing and responding to Second Request modification complaints on an expedited pace.²⁰⁰ These compacted periods of review are necessary to minimize extended delay of the merger review process and, therefore, should be incorporated into legislative reforms.

B. Panel of Antitrust Experts

Antitrust law has an evolutionary character due to its reliance on developing economic theories.²⁰¹ As experience has clearly demonstrated, economic theories are constantly being adjusted for various reasons,²⁰² including changing business practices, technological advancement, deregulation of certain industries, and the establishment of a global

¹⁹⁷ Sims & Herman, *supra* note 10, at 889 (criticizing the FTC and DOJ for their drastically different approach taken in cases that are not reportable under HSR and, therefore, lack the ability to issue a Second Request). Sims & Herman claim that outside the HSR context, when the agencies are forced to seek a Civil Investigative Demand (CID) or subpoena to obtain additional information, as opposed to a Second Request, agencies are much less aggressive. According to them, "[t]his alone shows that appeal to an agency supervisor, no matter how reasonable, is no substitute for appeal to a neutral arbiter." *Id.*

¹⁹⁸ DOJ Report to Congress, *supra* note 180.

¹⁹⁹ *Id.*

²⁰⁰ Statement of the Federal Trade Commission, *supra* note 180.

²⁰¹ William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 43–60 (2000) (detailing the presence of economic analysis in antitrust law since the enactment of the Sherman Act in 1890); Kovacic, *supra* note 22, at 850–51 (2001) (discussing the importance of economic analysis).

²⁰² Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak Are Misguided*, 68 ANTITRUST L.J. 659, 680 (2001) (noting that economic theories tend to evolve slowly as economists more accurately assess different economic influences over time).

market.²⁰³ Because of these changes, reliance upon economists and other experts is extremely important and commonplace in antitrust cases²⁰⁴ to determine at least two central considerations: (1) the relevant commercial market, and (2) the existence of efficiencies that may save an otherwise problematic activity from violation of the antitrust laws.²⁰⁵

Instead of limiting the assistance of experts to testimonial analysis of particular facts in a litigated case, a panel of antitrust experts should be created to make the limited determination of whether a Second Request is unreasonably burdensome given the particular circumstances of a deal, such as the industry involved. Federal judges and magistrates currently preside over antitrust issues, as well as determine the proper scope of discovery under the Federal Rules of Civil Procedure; however, they may be ill-equipped to provide the expedient review necessary for effective HSR reform. The judiciary has been shielded from reviewing Second Requests since the requests' creation in 1976, thereby limiting its experience with the process. Moreover, because the agencies' use of the Second Request process helped cause privatization of merger and acquisition law,²⁰⁶ challengers of Second Requests may be hesitant to place the corporations' future in the capable, but inexperienced, hands of outsiders.²⁰⁷

Economists, members of the business community, industry experts, former agency employees, corporate counsel, and similar experts, on the other hand, provide valuable insider knowledge and practical experience. By selecting individuals from each of these groups to comprise a panel of expert judges, this knowledge and experience will enable the panel to make accurate decisions on an expedited time schedule, without imposing a larger burden upon federal district court judges and magistrates.²⁰⁸ Not only are these

²⁰³ Kovacic, *supra* note 22, at 846 ("Performing the predictive exercise can be especially difficult in sectors featuring rapid change as a result of technological dynamism, deregulation, or globalization.").

²⁰⁴ See, e.g., *New York v. Kraft General Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995); *In re High Fructose Corn Syrup*, 295 F.3d 651 (2002); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953).

²⁰⁵ Kovacic & Shapiro, *supra* note 201, at 43–60.

²⁰⁶ See Grimes, *supra* note 95 and accompanying text.

²⁰⁷ Sims & Herman, *supra* note 10, at 889–90.

²⁰⁸ A similar approach was briefly entertained to "review the process of second-request formulation and compliance," but was directed at merger assessment by an economic expert that was "not . . . at the discretion of or subject to selection by the district court." Abbot B. Lipsky, Jr., *Antitrust Economics—Making Progress, Avoiding Regression*, 12 GEO. MASON L. REV. 163, 176 (2003). Lipsky expresses concern about the institutional formats used to provide economic evidence and suggests several reforms to improve the costs and accuracy of economic testimony. *Id.*

individuals, like federal judges, intimately aware of the evolving antitrust doctrine, they also have experienced the frustrations, time delays, expenses, and disclosure obligations inherent in the Second Request process. The collective wisdom of a panel of antitrust practitioners will effectuate a pragmatic and balanced approach to investigations, as Congress originally intended. The panel would be sensitive to informational demands of the administrative agencies by recognizing the need for certain disclosures to make an informed and accurate decision to proceed with litigation or to permit the transaction. It would also be receptive to present concerns of the business community, because the experience of the panel would enable it to review a Second Request on an expedited basis, thereby limiting any unnecessary chills upon merger proposals.

C. Clear and Convincing Standard of Review

While the first two elements of this proposal reduce the overall burden of compliance with a Second Request on companies, the third element—requiring the complainant companies to prove that the issued Second Request is unreasonably burdensome by clear and convincing evidence—maintains the agencies' ability to obtain necessary information without being continually subjected to meritless claims. The importance of providing accurate and sufficient information to the FTC and DOJ to make their decisions is unquestioned. The expected result and the current state of affairs is that the agencies use (or abuse) the process for purposes other than a brief review of merger proposals.²⁰⁹ Because of the litigation expenses associated with any judicial review and the possibility of heavy-handed judicial oversight, complainants will likely consider the merits of their claims; however, a clear and convincing standard of review will encourage firms to reserve the judicial review process for only the most offensive cases.²¹⁰

²⁰⁹ Sims & Herman, *supra* note 10, at 868–69 (noting that the agencies are able to use the Second Request process to obtain “essentially unlimited precomplaint discovery” along with a great deal of bargaining leverage due to their ability to delay the transaction at will).

²¹⁰ One criticism of this proposal may be that the DOJ and FTC lack the financial wherewithal to litigate these reviews in a court. While this is possible, it is unlikely, because the agencies would avoid spending extended periods of time negotiating a modified Second Request, agency staff would most likely represent the agencies in court instead of requiring senior officials within the agency to review contested Second Requests as the statute currently mandates, and the expedited and limited nature of the proposal minimizes the administrative burdens that implementation of the proposal would entail. Even assuming that the agencies would require more funding if the proposal were adopted, the current system of funding antitrust enforcement through the filing fees of the HSR has been criticized by nearly all parties, including agency insiders, as being

VIII. CONCLUSION

The HSR provisions, specifically those concerning the Second Request investigation, are in need of reform. Contrary to the original intent of Congress, the administrative agencies exploit the procedural mechanism to unilaterally regulate substantive merger issues without being constrained by a neutral arbiter. While recent internal reforms in the DOJ and FTC, both voluntary and statutorily-mandated, improved the process, the system lacks the institutional protection of the judiciary to prevent abuse by the agencies in order to gain bargaining leverage and unlimited precomplaint discovery. Moreover, companies that receive Second Requests are still faced with indefinite time delays, compliance costs, and disclosure obligations because the requests can require duplication and production of thousands of documents, over several months, costing millions of dollars.²¹¹ Because of these burdens, companies subject to Second Request investigations, such as Oracle and Blockbuster, may take substantial risks by providing some documentation in response to a Second Request, certifying compliance, then announcing their intent to proceed with the transaction. At \$10,000 per day for a violation, it is an extremely risky venture for combating the perceived exploitation of the Second Request process by the agencies.

Legislative reform, therefore, is necessary to reduce the structural imbalance of the HSR Second Request investigation. Three possible reforms include: (1) limiting the scope of information that may be requested in a Second Request; (2) limiting the time period that the DOJ and FTC are given to make a decision as to whether to proceed with formal litigation; and (3) providing expedited review by a panel of antitrust experts. Because the first two possibilities would often result in both over- and underenforcement of the antitrust laws and would fail to properly balance the needs of the agencies and companies involved, Congress should develop a streamlined review process by a panel of experts to address the problems. Expedited review, expert judges, and a clear and convincing burden of proof should be incorporated as the cornerstones of the reform in order to balance the governmental need for information and the justifiable concerns of the

inappropriate. *Reauthorization of the Federal Trade Commission: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. of Commerce, Science, and Transp.*, 106th Cong. 1088 (2000) (statement of Comm'r Leary) ("Ideally, agency funding would be decoupled from filing fees entirely.").

²¹¹ Stratton & Sicalides, *supra* note 137; Committee on Antitrust & Trade Regulation, *Supplement to the 2002 Milton Handler Annual Antitrust Review Proceedings: Recent Developments in Four Areas of Antitrust Law: Merger Enforcement; Criminal Enforcement and Health Care Initiatives; Exclusionary Conduct; and the Noerr-Pennington Doctrine and State Action Immunity*, 2003 COLUM. BUS. L. REV. 451, 456-58 (2003).

business community. As a body of case law develops, the system will recognize increases in efficiency through increased transparency in the scope of permissible requests, the time and costs necessary to achieve substantial compliance with the Second Request will be decreased, and, most importantly, there will be an external constraint on the implementation of de facto injunctions by the agencies, thereby restoring the original purpose of the Hart-Scott-Rodino Act.